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**IN THE
Supreme Court of the United States
OCTOBER TERM, 1949.**

FEDERAL POWER COMMISSION, Petitioner,
v.
THE EAST OHIO GAS COMPANY, ET AL., Respondents.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit.

**MEMORANDUM IN SUPPORT OF PETITIONS FOR RE-
HEARING SUBMITTED ON BEHALF OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA, AMICUS
CURIAE.**

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February 1, 1950.

Supreme Court of the United States

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To the Honorable Supreme Court of the United States:

Comes now the Public Service Commission of West Virginia, *amicus curiae*, and presents this memorandum in support of the petitions for rehearing presented by the Respondents in the above entitled cause and in support thereof says:

1. The Public Service Commission of West Virginia is the regulatory agency of said State, created by Act of the Legislature of said State (Acts of the Legislature of West Virginia 1913 C.9, Acts 1915 C.8, 1921 C.150, Official

Code of West Virginia 1931, Chapter 24). Said Commission by said Acts of the Legislature is given regulatory powers with respect to rates, methods and practices of public utilities within said State.

2. Said Public Service Commission is concerned over the sweeping effect of the majority decision in this cause, which expands Federal Power Commission jurisdiction to the extent of curtailing and rendering ineffective to some extent current regulation by said Public Service Commission. It was admitted prior to the passage of the Natural Gas Act that state regulatory bodies such as the Public Service Commission of West Virginia had jurisdiction over the transportation and sale of gas within its borders and to fix the rate therefor, and since it is admitted that the purpose of the Natural Gas Act, at the time of its passage was not to take from state regulatory bodies any jurisdiction that they had over the transportation and sale of gas within their respective states, we respectfully submit that that jurisdiction remains with state regulatory bodies, and if we are correct in this the Federal Power Commission has no jurisdiction over the transportation and sale of gas wholly within the State.

3. The majority opinion as to which rehearing is sought holds:

“... the national commerce power alone covered the high pressure trunk lines to the point where pressure was reduced and the gas entered local mains, while the state alone could regulate the gas after it entered those mains.”

Such holding would seem to restrict the regulatory power of the states, including West Virginia, to a small service area, served only by a low pressure transmission system and which indicates that the next construction will de-

fine as extending no further than the city gates. In fact, the instant opinion says "state regulatory power could not reach high pressure trunk lines." We respectfully submit that this is new thinking on this subject and a radical departure from what we have heretofore understood to be the law. The majority opinion complained of drives this point home later by saying "once a company is found to be a 'natural gas company,' no state can interfere with federal regulation."

The last statement quoted from the majority opinion also demonstrates the departure from the former rule as heretofore it has been thought that the Natural Gas Act was designed to supplement and not supplant state regulation.

We respectfully suggest that this change in construction does not appear to be consistent with prior decisions of this Court in the light of the legislative history of the Natural Gas Act. In the case of *Panhandle Eastern Pipe Line Co. v. Commission*, 332 U. S. 507, the Court said on page 519 that in extending federal regulation Congress "was meticulous to take in only territory which this Court had held the states could not reach." In the case last cited, this Court said, beginning on page 517:

"The Act (Natural Gas Act), though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. This appears not merely from the situation which led to its adoption and the legisla-

tive history,¹ including the committee reports in Congress cited above, but most plainly from the history of § 1 (b) in respect to the changes which took place in reaching its final form.

"It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what appellant asks us to do. For the essence of its position, apart from standing directly on the commerce clause, is that Congress by enacting the Natural Gas Act has 'occupied the field,' i. e., the entire field open to federal regulation, and thus has relieved its direct

¹Included in the legislative history referred to is note 13 of said opinion here quoted in full:

"In HR Rep No. 709, 75th Cong 1st Sess the Committee on Interstate and Foreign Commerce said of the proposed bill which became the Natural Gas Act: 'It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Serv. Commission* (1920) 252 US 23, 64 L ed 434, 40 S Ct 279, PUR 1920E 18.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924) 265 US 298, 68 L ed 1027, 44 S Ct 544, and *Public Utilities Commission v. Attleboro Steam & Electric Co.* (1927) 273 US 83, 71 L ed 549, 47 S Ct 294.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.'

"See also HR Rep No. 2651, 74th Cong 2d Sess 1-3; Sen Rep No. 1162, 75th Cong 1st Sess."

industrial sales of any subordination to state control.

"The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach."

"In HR Rep No. 709, 75th Cong 1st Sess the Committee on Interstate and Foreign Commerce said of the proposed bill which became the Natural Gas Act: 'It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Serv. Commission* (1920) 252 US 23, 64 L ed 434, 40 S Ct 279, PUR 1920E 18.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924) 265 US 298, 68 L ed 1027, 44 S Ct 544, and *Public Utilities Commission v. Attleboro Steam & Electric Co.* (1927) 273 US 83, 71 L ed 549, 47 S Ct 294.) The basic purpose of the present legislation is to occupy this field in

which the Supreme Court has held that the States may not act.'

"See also HR Rep No. 2651, 74th Cong 2d Sess 1-3; Sen Rep No. 1162, 75th Cong 1st Sess."

Most respectfully we suggest that the legislative history of the Natural Gas Act clearly shows that Congress did not intend to give plenary powers to the Federal Power Commission and this Court in the past has consistently (or so we believe) held that the Act was designed to supplement and not supplant state regulation. The existence of state jurisdiction over the regulation of local natural gas distributing companies has uniformly been determined in the past on the basis of the Cooley doctrine (*Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23). The present decision apparently abandons the Cooley doctrine in favor of a theory based on the mechanics of the gas industry. We cannot believe that Congress intended gas pressure, either natural or manufactured, to be determinative of jurisdiction as between state and federal regulation.

With all due deference we point out that the *Illinois Gas* decision, 314 U. S. 498, upon which the instant decision is predicated, is not analogous to the instant case as that company was engaged in wholesale sales of natural gas, whereas East Ohio makes no sales for resale, being engaged solely in the local distribution of natural gas. That Congress had this clearly in mind would seem to be amply demonstrated by the footnote herein quoted in extenso as footnote 13 to the opinion in the *Panhandle* case wherein it is said:

" * * * However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different."

4. Of course, the instant decision is no less important as to accounting regulation. Regulation, accounting-wise, by the Federal Power Commission in the case of East Ohio serves no useful or necessary purpose. The record makes no showing of such. The case involves no rates subject to Federal Power Commission determination. To uphold the Federal Power Commission accounting order can result only in further conflict, accounting-wise, between the state and federal commission, and ultimately further litigation. The unnecessary extension of the federal power, primarily, however, will result in increased expense to the company which will be reflected in the rates charged the ultimate consumer.

Conclusion

The Public Service Commission of West Virginia was one of the state agencies which urged the passage of the original Natural Gas Act upon Congress and has long sought complete regulation of utilities in the interest of the consumers of natural gas in West Virginia, and most respectfully urges that the petitions for rehearing be granted and the decree of the United States Court of Appeals for the District of Columbia be, upon further consideration, affirmed.

All of which is respectfully submitted.

WILLIAM C. MARLAND,
*Attorney General of West
Virginia.*

CHARLES M. LOVE,
WALTER R. McDONALD,
*Attorneys for the Public
Service Commission of West
Virginia.*

Certificate of Counsel

We, attorneys for the Public Service Commission of West Virginia, *amicus curiae*, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith, and not for delay.

WILLIAM C. MARLAND,
*Attorney General of West
Virginia.*

CHARLES M. LOVE,
WALTER R. McDONALD,
*Attorneys for the Public
Service Commission of West
Virginia.*